

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 63098-9-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
DARRYL WILLIAMS,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: June 21, 2010
)	

Lau, J. — Darryl Williams challenges his conviction for delivery of a controlled substance in violation of the Uniform Controlled Substances Act. He argues there was insufficient evidence to prove he constructively transferred cocaine to two undercover officers because there was no evidence the cocaine belonged to him or was under his control. We agree. Accordingly, we vacate his conviction and remand for dismissal.

FACTS

On the evening of March 12, 2008, undercover police officers Marie Gochnour and Susanna Monroe were posing as drug buyers in a “buy-bust” operation in Seattle. Officer Monroe testified that when they walked by a motel along East Marginal Way, a

man, later identified as Williams, called out to them to get their attention. He asked them what they were looking for and she said, “[C]ream,” a slang term for crack cocaine. He asked how much they wanted, and she told him \$40 worth.

At that point, Williams tried to get the two women to follow him to his car, but they refused for safety reasons. The officers began walking away, but a few minutes later Williams called them back. He said he had made a phone call, and his dealer would bring the drugs to them. After waiting for about 10 minutes, Officer Monroe asked him, “How much longer?” and Williams assured her his dealer would be there shortly. Verbatim Report of Proceedings (Dec. 11, 2008) at 90.

The dealer, later identified as Bruce Watson, arrived a few minutes later, driving a black Monte Carlo along a side street. Officer Monroe testified that Williams went to greet him and motioned for them to follow, but they refused because it was too dark on the side street. Williams became angry and told them that Watson was not going to finish the deal with them unless they went to where he was parked. But by that point, another individual seeking to buy drugs had joined the women, and he also refused to go to where Watson was parked. Eventually, Watson drove to where the three were standing, and they gave him money through the car window in exchange for drugs. Williams stood next to Officer Monroe during the transaction and began walking with her after Watson drove away. He repeatedly asked her for a piece of crack for arranging the deal, but she refused. He was angry and returned to his hotel room.

About an hour later, Officer Monroe called Williams and invited him to join them at a nearby hotel. Williams agreed after she told him she still had some of the drugs.

Williams left his hotel and was arrested. He had a glass crack pipe on his person. Other police officers arrested Watson and recovered the premarked money Officer Monroe had given him.

The State charged Williams with violating the Uniform Controlled Substances Act by delivering cocaine, a controlled substance, contrary to RCW 69.50.401(1), (2)(a). At the end of trial, the jury was instructed that “[d]eliver or delivery means the actual or constructive transfer of a controlled substance from one person to another.” Instruction 9. There was no accomplice liability instruction, and the State did not argue that Williams was guilty as Watson’s accomplice.¹ Instead, the State solely argued that Williams delivered the cocaine through a constructive transfer. During its deliberations, the jury inquired, “May we have a legal definition of ‘constructive transfer’?” The trial court responded “No. Please refer to your jury instructions.”

The jury found Williams guilty as charged. The trial court imposed a prison-based Drug Offender Sentencing Alternative (DOSA) with 45 months of confinement followed by 45 months of community custody. Williams appeals.

ANALYSIS

Williams contends the State failed to present sufficient evidence to prove beyond a reasonable doubt that he “delivered” a controlled substance. Evidence is sufficient to support a conviction if, after viewing it in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits

¹ Our review of the record shows the State did not allege accomplice liability.

the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

The Washington Uniform Controlled Substances Act provides, “[I]t is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” RCW 69.50.401(1). Cocaine is a controlled substance. RCW 69.50.206(4)(b). “Deliver” or “delivery” is defined as “the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship.” RCW 69.50.101(f). The act does not define either “actual transfer” or “constructive transfer,” but these terms are discussed in case law.

In State v. Campbell, 59 Wn. App. 61, 795 P.2d 750 (1990), the court cited to the dictionary for the common understanding of “transfer,” interpreting it to mean “to carry or take from one person or place to another” or, more broadly, “to cause to pass from one person or thing to another.” Campbell, 59 Wn. App. at 64 (quoting Webster's Third New International Dictionary 2426–27 (1971)). It also looked to how other states had interpreted “constructive transfer” in construing their versions of the Uniform Controlled Substances Act. Campbell, 59 Wn. App. at 63–64. In particular, it cited a Texas opinion for its description of a constructive transfer as “the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control, by some other person or manner at the instance or direction of the defendant.” Campbell, 59 Wn. App. at 63 (quoting Davila v. State, 664 S.W.2d 722, 724 (Tex. Crim. App.1984)).

Here, the State concedes that Williams did not actually transfer the drugs, but

contends that he constructively transferred them because he acted to facilitate the transaction. It points to evidence that Williams solicited the officers by calling out to them and asking what they were looking for. After they told him they were looking for crack cocaine, he attempted to take them somewhere in his car, and when that failed, he arranged for Watson to bring the drugs to them. When Watson was late and when he initially refused to drive to where the officers were standing, Williams acted as a mediator between the officers and Watson. The State contends this is sufficient to show a constructive transfer.

It relies on Campbell, but that case is factually dissimilar. There, the defendant sold cocaine to an undercover police officer through an intermediary. The defendant placed the cocaine on a car seat. He then directed a third person to pick it up and hand it to the officer. Campbell, 59 Wn. App. at 62. The court held that this constituted a constructive transfer and affirmed his conviction for delivery of a controlled substance. Campbell, 59 Wn. App. at 63–64. But here, unlike Campbell, there was no evidence Williams ever possessed the cocaine or that he used Watson as an intermediary to actually transfer the drugs.

Both parties also rely on cases from other states. The results in these cases vary based on their facts. In Davila, an informant took an undercover drug enforcement agent to a residence to get heroin. Davila was living there with her husband. She had met the agent two weeks before. She asked him what he was looking for. He replied simply, “[F]our.” Davila left the room and returned with her husband. He asked the agent what he wanted and the agent again replied, “[F]our.” With Davila watching, her

husband gave the agent four balloons containing heroin in exchange for \$120. A jury convicted Davila for delivery of heroin by constructive transfer. Davila, 664 S.W.2d at 723–24. On appeal, the court held there was insufficient evidence to support the conviction because there was no evidence that the heroin belonged to Davila, that it was under her direct or indirect control prior to its delivery, or that her husband transferred it at her instance and direction. Davila, 664 S.W.2d at 724. The court concluded, “There is no proof that [Davila] had any control over [her husband’s] actions.” Davila, 664 S.W.2d at 725.

In contrast, the court in Swinney v. State, 828 S.W.2d 254 (Tex. Ct. App. 1st Dist. 1992), affirmed the defendant’s conviction for delivery of cocaine based on constructive transfer. There, an undercover officer drove past the defendant and three other males who were standing in a convenience store parking lot and giving gestures to indicate they were selling drugs. The officer stopped and told the group he needed “a twenty.” The defendant left the group, directed the officer to park his car, and asked him what he needed. When the officer told the defendant he was looking for a twenty-dollar rock, the defendant returned to the group and spoke with one of them, a juvenile. The defendant then accompanied the juvenile back to the officer’s car. The juvenile sat in the passenger seat, and the defendant stood just outside the open car door. The juvenile handed cocaine to the officer in exchange for twenty dollars and then returned to the group with the defendant. Swinney, 828 S.W.2d at 256. In viewing these facts in the light most favorable to the State, the court concluded that they could show the defendant exercised indirect control over the cocaine and that the juvenile acted under

his direction. Swinney, 828 S.W.2d at 258.

In Commonwealth v. Murphy, 795 A.2d 1025 (PA. Super. Ct. 2002), an undercover state trooper asked Murphy where he could buy heroin. Murphy asked if he was a cop, which the trooper denied. At that point, Murphy called out to another man, Rivas, who joined them. Rivas asked Murphy if the trooper was a cop and Murphy replied, “[N]o, he’s cool.” Murphy, 795 A.2d at 1028. The trooper told Rivas he wanted two bags, and while Rivas left to retrieve them, the trooper and Murphy had a casual conversation. When Rivas returned, he told the trooper to follow him to a side street. Rivas dropped the bags and told the trooper to drop the money. As the trooper was returning to his car with the drugs, Murphy asked him for a portion of the drugs as payment for connecting him with Rivas, but the trooper gave him money instead. Murphy, 795 A.2d at 1029. The court held this was insufficient to establish a constructive transfer by Murphy because there was no evidence that the heroin belonged to Murphy or was under his dominion and control.² Murphy, 795 A.2d at 1032–33. The court also stated that the evidence failed to establish that Murphy directed or controlled Rivas’s actions. Murphy, 795 A.2d at 1033. Nevertheless, the court affirmed Murphy’s conviction on the alternative theory of accomplice liability.³

² In addition to the description of “constructive transfer” from Davila, discussed above, the court also relied on the definition of “constructive transfer” in Black’s Law Dictionary: “A delivery of an item—esp. a controlled substance—by someone other than the owner but at the owner’s direction.” Murphy, 795 A.2d at 1031 (quoting Black’s Law Dictionary, at 1503 (7th ed. 1999)).

³ Here, unlike in Murphy, the jury was not instructed on accomplice liability.

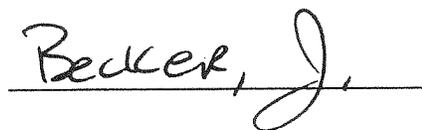
This case is more like Murphy and Davila than Swinney. Here, the State's evidence shows at most that Williams facilitated the transfer between Watson and Officer Monroe. By itself, this is insufficient to establish a constructive transfer.⁴ Under Campbell, to establish a constructive transfer, the State had to prove that Williams effected "the transfer of a controlled substance either belonging to [him] or under his direct or indirect control" Campbell, 59 Wn. App. at 63 (quoting Davila, 664 S.W.2d at 724). But they presented no evidence that the cocaine belonged to Williams. And a rational trier of fact could not find he had control over the cocaine. The evidence showed that the cocaine was in Watson's possession, and, though Williams wanted to acquire some, he was unable to do so. His hope was to refer a buyer to Watson and then persuade the buyer to share some of the cocaine with him. This evidence shows that Watson, Williams's drug dealer, was in control of the drugs, not Williams. In contrast, the evidence in Swinney allowed for a reasonable inference that it was the defendant who was the drug dealer, while the juvenile who handed over the drugs was acting under his control.

Because there is insufficient evidence to show that the cocaine belonged to

⁴ The State also cites State v Ramirez, 62 Wn. App. 301, 814 P.2d 227 (1991), for the proposition that any involvement in a drug transaction constitutes delivery. But that case addressed the availability of the "buyer's agent defense" under the Uniform Controlled Substances Act (it concluded that by criminalizing "delivery" of controlled substances, as opposed to merely their "sale" as under prior law, the act did not permit a defendant to avoid criminal liability for transferring controlled substances by claiming to have done so on behalf of the buyer rather than the seller). Ramirez, 62 Wn. App. at 307-08. It did not address the meaning of "constructive transfer," so it is not helpful here.

Williams or that he had direct or indirect control over the it, the State failed to prove that he “delivered” it to Officer Monroe.⁵ Accordingly, we vacate his conviction and remand for entry of an order of dismissal.

WE CONCUR:

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⁵ Our resolution of this issue makes it unnecessary for us to address the other issues Williams raises.